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No. 06-

IN THE

Supreme Court of the United States

LISA J. GIBSON,

Petitioner,

v.

THOMAS J. GIBSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state statute and enabling procedural rule per se unconstitutional when they provide an absolute right to a private trial merely upon the request of one party?

2. What harm, if any, must a litigant prove in order to contest a statute that provides the unconditional and absolute right to a private trial?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: N/A

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Lisa J. Gibson, by and through her attorneys, Robin J. Barber and Gary E. Gowen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Nevada Supreme Court entered in this proceeding.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix C to the petition and, upon information and belief, is unpublished.

JURISDICTION

The date on which the highest state court decided my case was December 26, 2006. A copy of that decision appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

1. United States Constitution, Article 1 (First Amendment):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. United States Constitution, Article 14, Section 1 (Fourteenth Amendment, Due Process and Equal Protection Clause):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Nevada Revised Statute (NRS) 125.080:

In any action for divorce the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private, and upon such direction all persons shall be excluded from the court or chambers wherein the action is tried, except the officers of the court, the parties, and their witnesses and counsel.

4. Eighth Judicial District Court Rule (EDCR) 5.02

(a) In any contested action for divorce, annulment, separate maintenance, breach of contract or partition based upon a meretricious relationship, custody of children or spousal support, the court must, upon demand of either party, direct that the trial or hearing(s) on any issue(s) of fact joined therein be private and upon such direction, all persons shall be excluded from the court or chambers wherein the action is heard, except officers of the court, the parties, their witnesses while testifying, and counsel.

(b) In appropriate cases when a party has demanded that the trial or hearing be private, the court may nevertheless permit an expert witness either called by the court or by a party to remain in the courtroom to observe and hear other relevant portions of the proceedings, including the testimony of other witnesses, when the court has determined that such action would promote the interests of justice or the best interest of a child.

STATEMENT OF THE CASE

An action for divorce was filed in Nevada on or about May 1, 2001 by Respondent.[1] By court ruling and jurisdictional requirements, this case was bifurcated with jurisdiction of the actual divorce and all property issues reserved exclusively to the Nevada court and all "child" issues reserved exclusively to the New Hampshire court. This Petition pertains only to the Nevada proceeding.

At the beginning of the litigation, Respondent demanded the trial and pretrial proceedings be closed to the public pursuant to NRS 125.080 which provides the absolute right to a private trial merely upon the request of either party to the action. During the private judicial proceedings in the case at bar, substantive and the procedural law were either completely disregarded or applied only when not adverse to Respondent's interests. For example, the trial court ignored Petitioner's property interest in the community and the joint preliminary injunction (JPI) obtained by Respondent to preserve the community property. The trial court disregarded the incredibility of Respondent's affidavit, and its "inconsistencies," that were further contradicted by the testimony, representations and documentary evidence introduced at trial and in several pretrial hearings. Additionally, Respondent was permitted to file untimely pleadings which then prevented Petitioner from filing timely objections or responses supported by the evidence. There were no repercussions to Respondent by the trial court for these actions which were prejudicial to Petitioner. On the

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[1] A complaint for divorce was filed by Petitioner's original attorney without her permission or consent on or about March 2, 2001. Said complaint was dismissed by Petitioner. Thereafter, Respondent filed a complaint and the two cases were linked pursuant to Nevada rules of procedure.

other hand, the omissions and misconduct accorded to Respondent were not available to Petitioner. For example, when Respondent disagreed with statements or testimony made by Petitioner, the trial court declared that there would be serious repercussions to Petitioner, and specifically her female attorney, if the court found out these statements were not accurate. Fortunately, Petitioner was able to submit proof of the truth of each of her representations of fact to avoid the trial court's wrath.

In summary, the standards of proof which the trial court applied to Petitioner were essentially provable to perfection while Respondent's intentionally false and misleading representations, including sworn statements, were casually disregarded. The trial court exhibited a "so what" attitude to Respondent's misconduct and gave such conduct credence despite clear evidence belying his representations. These actions by Respondent, while employed as a deputy district attorney, and the trial court, were concealed from public view in these closed hearings and trial proceedings.

Respondent was allowed to engage in a wholesale pattern of unethical and improper conduct, including but not limited to a pattern of regularly destroying evidence, withholding documents he did not destroy, concealing evidence and making false and/or misleading statements to the court. During trial, Respondent acknowledged he knew the documents he destroyed were subject to a request for production of documents and responsive to this request. The trial court required no accountability from Respondent during the entire litigation despite requests for the same and the presence of irrefutable evidence of this misconduct acknowledged by the trial court.

Prior to the trial, Petitioner objected to closure of the proceedings to the public on constitutional grounds. The trial court refused to consider or address these substantial objections, advising Petitioner to take the issue to the Nevada Supreme Court on a Writ. Consequently, prior to trial, Petitioner filed a Petition for Writ of Mandamus in the Supreme Court of Nevada exclusively on the issue of closed hearings and citing to assorted examples of concealed misconduct. Using its discretionary authority, the Nevada Supreme Court denied Petitioner's application for the Writ. Petitioner then sought federal injunctive relief to prevent the closed judicial proceedings in the trial court from going forward. The United States District Court for the District of Nevada denied Petitioner's application for injunctive relief.

Essentially, the closed trial resulted in Petitioner being denied any part of the community she helped to build from the time Respondent unilaterally decided the marriage was over, and she was forced to go to trial without the bulk of discovery from Respondent, without funds to litigate and without funds to pay for her to attend the trial.

On direct appeal, in an unpublished opinion, the Nevada Supreme Court found that Petitioner was entitled to one-half the community property based on the community property statute. However, the Supreme Court disregarded the arbitrary and capricious application by the trial court of Nevada's interim support statute which resulted in depriving Petitioner of a portion of the community property at the critical stage of the litigation process when it was needed most to protect her property rights at trial. The record shows that during the litigation, Respondent was in sole possession, control and use of the community income, and he was vested with unrestricted use of more than $100,000.00 in community income, including community funds, to litigate and protect his property interests.

Conversely, Petitioner was forced to be dependent upon her family for support, including heart medication and payment of community bills in her possession. Because the court refused to take timely action against Respondent for his intentional discovery violations, Petitioner was forced to attempt to "recreate" Respondent's spoliated, concealed and withheld discovery at her own expense and via the expensive requirement of personally served subpoenas and payment for document recovery/replacement without the use of community funds. In fact, Petitioner sent approximately twenty-two subpoenas and received a partial or full response from only two, leaving Petitioner unable to impeach Respondent's unsubstantiated testimony at trial upon which the division of debt was based. The record belies the trial court's "findings" that Petitioner was, in fact, able to recreate the majority of the discovery destroyed, concealed and withheld unlawfully by Respondent.

Despite this substantive, procedural and economic abuse, the Nevada Supreme Court found Petitioner was not an "aggrieved" party unless she was able to prove entitlement to some portion of the six figure community property on remand. The Nevada Supreme Court also held that Petitioner's constitutional objection to the absolute right to have closed hearings was "without merit," intimating that a showing of "harm" was required in order to make a per se constitutional objection. Further, despite its order of remand to the trial court to determine the value of Petitioner's community property interest diverted to Respondent's "significant other", the Court ignored Respondent's willful misconduct he employed throughout the divorce litigation and determined that Petitioner was not "harmed."

What happened to Petitioner in this case is the same harm predicted by the Nevada Supreme Court Gender Bias Task Force Study (Study). According to that Study, the economic injustice to Petitioner is the result of a pattern denying her community property rights from the start of the litigation. Thus, by the Nevada Supreme Court's own investigation, Petitioner was harmed by the trial court's actions.

Petitioner's case is unique in that the bifurcation provides an ability to review the actions of the Nevada trial court purely with respect to the disparate treatment of the property rights of men versus women which, under Nevada law, are theoretically "present, existing and equal." However, in reality the wife is left begging for scraps off the community table at the time when equality needs to be recognized and enforced most.

Further, Petitioner's case is an excellent example of why it is necessary to conduct these proceedings in the sunshine of open hearings. In a public forum, it is less likely that the trial court would have allowed the false and/or misleading statements (sworn and unsworn) and the willful, deliberate destruction of evidence by a public officer such as a deputy district attorney to go unpunished, let alone be profitable to him. [2] Petitioner would not have been disadvantaged by trying to overturn, at the appellate level, unsupported findings by the trial court. More importantly, the public would have demanded accountability and explanation why Respondent was receiving such preferential

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[2] Respondent was not "punished" when the trial court based the debt on only Respondent's affidavit (not admitted into evidence) of purportedly $52,000 in debt held by Respondent while ignoring the $22,000 of documented debt held by Petitioner and actually entered into evidence by Petitioner without objection by Respondent. Respondent was assessed $1417 for the discovery violation, "profiting" in the amount of $70,000.

treatment. This case also provides a clear picture of the perils of covert judicial proceedings as well as the pure gender bias regarding property rights perpetuated by the state courts.

REASONS FOR GRANTING THE PETITION

In granting an absolute, unqualified right to a private trial, the Nevada statute and court rule are per se violations of the First Amendment of the United States Constitution (First Amendment) with respect to public trials and the extremely long precedent supporting the right and need for public trials.

"The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials 'before as many of the people as chuse to attend' was regarded as one of 'the inestimable advantages of a free English constitution of government'." *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 575 (1980). Interestingly, although this Court has consistently held the right to a public trial, it stated unequivocally that there was no right to a private trial. Therefore, this statute as written and applied is repelled by the United States Constitution and the many cases resulting therefrom.

"[A] trial is a public event. What transpires in the court room is public property." *Craig v. Henry*, 331 U.S. 367, 374 (1947). Historically, well-established case law has applied the same rules of closure in criminal actions to civil actions in general. *Richmond*, *supra*, at 557. "[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access . . . appears to have been the rule in England from

time immemorial . . . That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." *Richmond, supra*, at 566-567 (emphasis added).

The right to a public trial in noncriminal proceedings is equal to that in criminal proceedings. "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit the government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted." *Richmond, supra*, at 556. ". . . the right of access to ...trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 606 (1982).

Trials, civil or criminal, cannot be closed even by agreement of the parties and the trial judge: "[T]he First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures the public a right of access to trial proceedings, and that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public." *Richmond, supra*, at 557.

Public trials protect many of our most fundamental rights: they assure the public that procedural rights are respected (*Richmond, supra*):

- They assure that justice is afforded equally. (*Richmond*, *supra*).

- They serve as an effective restraint on possible abuse of judicial power. (*Richmond*, *supra*). Discussion of judicial conduct "is appropriate, if not necessary." (*Craig v. Henry*, *supra*).

- They protect the integrity of the fact-finding process. "Public scrutiny of a . . . trial enhances the quality and safeguards the integrity of the factfinding process, with the benefits to both the defendant and to society as a whole." (*Globe*, *supra*, and *Richmond*, *supra*).

- They give assurances that the proceedings were conducted fairly to all concerned. (i.e., *Richmond*, *supra*).

- "Moreover, public access to the . . . trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." (*Globe*, *supra*).

- They discourage perjury. (*Richmond*, *supra*).

- They discourage misconduct of participants. (*Richmond*, *supra*).

- They discourage decisions based on secret bias or partiality. (*Richmond*, *supra*).

- "And in the broadest terms, public access to . . . trials permits the public to participate in and serve as a check upon the judicial process—an essential

component in our structure of self-government." (*Globe*, *supra*).

- People will act in a different manner if their actions may be subject to exposure without their control (*Press-Enterprise Company v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984)).

Open hearings alone may have operated to quell the very injustices heaped upon Petitioner from the start of the litigation.

This Court went into great detail about the history of open trials and included noncriminal proceedings:

> "[T]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the . . . trial and the appearance of fairness so essential to public confidence in the system . . . Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness . . . The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprises*, *supra*, at 508-510 (emphasis added).

The public's right to know what standards are being applied by the courts and if they are being applied fairly is absolute. The public has a right to know if substantive and procedural laws are being applied equally or even at all and if justice is being served. For example, the public is entitled to know that the same accountability is being demanded of a deputy district attorney who destroys evidence and violates court orders as that of an average litigant. By this same reasoning, the public is entitled to know that preferential treatment is being given to a person due to status, gender, job title or some other impermissible basis. Closed hearings prevent this public review, and it is further obstructed when important issues in state supreme court decisions remain unpublished.

All of these issues are relevant in any judicial proceeding and are certainly no less relevant in the "family" court forum where the court at issue has documented a wife's property rights are denied routinely and substantially. Such disparate treatment between races would not be tolerated for an instant and gender bias conveniently hidden in "family" courts should be equally repellant.

In short, the Nevada statute and rule are diametrically opposed to the overwhelming weight of legal authority announced by this Court and based on historically noted safeguards to protect the fairness, integrity and confidence in the judicial process.

This Court should address this issue because, upon information and belief, this Court has not specifically addressed the issue of closed hearings within the "family" court forum. It is important to note that in this case there is no compelling State interest to close judicial proceeding to the public, such as might be present in child custody matters.

Over the years most, if not all, states have removed issues regarding children, marriages and related subjects from the regular civil courts and created a new form of court commonly referred to as "family" or "domestic" courts. Within these family courts, gender bias, economic abuse and gross misconduct are running rampant, causing litigants to seek federal court intervention which is usually denied, particularly to women, erroneously under the often misunderstood and expanded application of the "domestic" exception to federal court intervention (*Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206 (1992); see also *Marshall v. Marshall*, 547 U.S. 293, 126 S.Ct. (U.S. 2006)).

In particular, as both the divorce rate and rate of children born outside of marriage continue to increase, the likelihood of the "average" person being subjected to the jurisdiction of these courts continues to spiral upward. The impact of these escalating occurrences of covert judicial proceedings constitutes a growing menace, especially to women who are documented victims of gender bias in these very courts and who traditionally lose substantial property rights in these courts with lasting or at least long-term affect. This is not an isolated problem, and is increasing in scope every year.

Often, "special" rules and procedures are created only for these courts that would not be permissible or acceptable in criminal or general civil courts, including automatic sealing of records and/or, as in this case, the absolute right to a private trial. Observers are prevented from observing the double standards imposed by the courts, the rejection of the rule of law and the protection of certain persons and bias against a certain class of persons (women). Respect for these courts is deservedly lacking. By ignoring outcries for fair and equal treatment, allowing these grievances to be hidden behind closed doors and silenced by

rejection of federal intervention, the integrity of the judiciary and legal profession are severely compromised.

This Court should determine this issue of the absolute right to a private trial as the state of Nevada has refused and Petitioner has no other remedy.

Nevada law permits unrestricted closure of hearings without the fundamental constitutional mandate requiring evidence (not just mere allegation or supposition) justifying closure that outweighs the public's right to know. This is restricted to "family" courts where the field is literally men against women, and the Nevada Supreme Court has documented women are treated unfairly. The family court forum is mostly likely the least qualified court in which to vest determination of this basic constitutional issue that appears to overwhelm the trial and appellate courts, and is clearly and deliberately ignored at all state levels.

Had Petitioner's first hearing not been closed to the public, with people excluded prior to the start of the hearing merely upon the request of Respondent, the actions of those involved would have been publicly exposed at the outset and her rights protected. The actions of the participants (Petitioner excluded) indicate that behind these closed doors, the very conduct which is to be prevented by open hearings (i.e., perjury, equal justice, fact-finding, misconduct and judicial abuse) occurred at an almost unparalleled frequency.

The discriminatory taking of property rights is no less egregious when done in the form of the division of a marital partnership than done in the form of the division of a business partnership. Both are protected under the Fourteenth Amendment. Only one is held to a lesser standard—the division of property in a marriage, where wholesale disregard of the property interest of the wife

traditionally dominates the proceeding and where application of the rule of law is optional.

The state courts have refused to address the issue of the per se violation of the United States Constitution in the statute and court rule that create a right to a private trial, citing a lack of "harm" to Petitioner despite the consequences to Petitioner being the same adverse consequences identified by the Nevada Supreme Court Gender Bias Task Force Study. If one were to ignore, inter alia, the plethora of documented misconduct, too numerous to go into detail again in the body of this Petition, and find this flagrant misconduct and bias were not sufficient to establish harm, this still does not overcome the per se violations of the Constitution by the statute and rule.

The fundamental property rights of a class of citizens (women) are at stake, and it is the loss of these property rights through unconstitutional actions, including but not limited to covert judicial proceedings, that brings this case to this Court. They are the disenfranchised, silenced majority.

SUMMARY

This case presents to this Court the issue of whether a statute and rule providing for closed hearings within "family" courts merely at the request of a party, without requiring justification for closure be put on the record or grounds sufficient to overcome the extremely high preference for open hearings, is per se unconstitutional. If necessary, upon briefing, Petitioner is able to provide ample evidence of the very misconduct that open hearings are known to discourage, including but not limited to fact-finding that is belied by the record. There are numerous compelling reasons for this Court to grant certiorari,

including the broad application of this holding and the ability of this Court to settle legal questions currently unsettled. Of particular concern is the taking of property without constitutional safeguards within uncontrolled covert judicial proceedings granted as a matter of right.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Robin J. Barber
Robin J. Barber

/s/ Gary E. Gowen
Gary E. Gowen

Date: March 22, 2007

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APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

LISA J. GIBSON,	)	
Appellant,	)	No. 41699
vs.	)	
THOMAS J. GIBSON,	)	
Respondent.	)	
	)	

ORDER DENYING EN BANC RECONSIDERATION

Appellant Lisa J. Gibson and respondent Thomas J. Gibson have filed petitions for en banc reconsideration of the order Affirming in Part, Reversing in Part and Remanding entered by a panel of this court on September 26, 2006. Having considered the petitions on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petitions DENIED.[1]

/s/ Maupin /s/ Gibbons

/s/ Douglas /s/ Hardesty

/s/ Parraguirre

[1] The Honorables Robert E. Rose, Chief Justice, and Nancy A. Becker, Associate Justice, did not participate in the decision of this matter.



APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEVADA

LISA J. GIBSON,	)	
Appellant,	)	No. 41699
vs.	)	
THOMAS J. GIBSON,	)	
Respondent.	)	
	)	

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a divorce decree that resolved issues concerning spousal support, the division of community debt, and attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

FACTS AND PROCEDURAL HISTORY

Appellant Lisa Gibson and respondent Thomas Gibson married in 1989. Two daughters were born in 1990 and 1992.[1] Both parties have law degrees, but Lisa ceased practicing law and became a stay-at-home mother after the birth of their first daughter. Although testimony regarding the parties' understanding as to Lisa's employment conflicted, Lisa and Thomas agreed that Lisa would be a stay-at-home mother until the youngest child started first grade. She remained unemployed throughout the divorce proceedings below.

[1] We have recited only those facts that are necessary to our disposition of appellant's contentions.

For the first seven years of their marriage, the parties resided in Las Vegas. In 1996, Thomas accepted a position with the Federal Public Defender's Office in Tennessee and moved there with the family. Four years later, he resigned to avoid facing termination. At the time of his resignation, Thomas's salary totaled approximately $93,000 a year.

Thomas returned to Las Vegas in June of 2000 and obtained employment with the Nevada Attorney General's Office, with a starting salary of approximately $67,000. Within a few months, Thomas accepted a position with the Nye County District Attorney's Office. Thomas now resides in Nye County and earns approximately $72,000 a year.

Lisa and the children initially remained in Tennessee, but later moved to New Hampshire where they now reside with Lisa's extended family. New Hampshire has jurisdiction over child support and custody issues. Thomas currently pays $1,344 per month in child support through the New Hampshire court system.

In April 2001, Thomas filed for divorce in Clark County, and Lisa proceeded to file motions for interim relief and requested production of documents. Thomas responded with a written answer to each request and a copy of his most recent paycheck, a copy of his resume, and copies of returned checks. In an order filed in July 2002, resolving all pending motions, the district court denied Lisa's motion for interim relief and ordered Thomas to pay Lisa's attorney fees. The district court also allowed some of Thomas's responses to Lisa's requests to stand and modified other requests.

A three-day trial began on November 18, 2002. During the course of the trial, Lisa was represented by Gary Gowen, Esq., and Lisa's sister, Robin Barber, Esq.

Christopher Gilman, Esq., represented Thomas. Following trial, the district court filed a decree on May 30, 2003, dissolving the marriage.

The district court found that Thomas failed to provide discovery concerning his personnel records from the Federal Public Defender's Office, bank records and credit card statements generated during the pendency of the divorce proceedings. Due to these failures, the district court awarded Lisa $10,000 in attorney fees and $1,417 in costs.[2] The district court also awarded Lisa $14,583 in rehabilitative and equitable spousal support.

Because a bank in Tennessee foreclosed upon the marital residence, the court found that the parties had no other substantial assets. The court further found that, from June 2000 to March 2001, Thomas provided Lisa approximately $30,000 for family support and payment of community debts.

The district court further found that the parties incurred approximately $52,000 in community debt. It appears from the record that the district court derived this figure from Thomas's affidavit of financial condition (AFC). The district court structured the debt allocation as follows: first it ordered Thomas to assume responsibility for the entirety of the community debts; second, it awarded Thomas a judgment against Lisa for her share of the community debt, $26,000; third, it completely offset this judgment by the amount of her attorney fees, costs and, additionally, the entry of an equitable award of spousal support. The support award

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[2] The court also found that Lisa was entitled to an award of attorney fees pursuant to Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972). The district court found that Lisa was not otherwise prejudiced by Thomas's failure to comply with her discovery requests, as Lisa was able to obtain the financial information directly from the banks and lending institutions.

exactly equaled the difference between her one-half portion of the debt and her fees and costs. In this, the district court ordered Thomas to assume all responsibility for the community debt and to hold Lisa harmless therefrom.

Lisa now appeals, alleging approximately 40 errors which can be generally grouped into the following areas: the closure of the hearings, determination of community debt and payments to the family, waste, underemployment, discovery, and judicial bias. For the reasons stated below, we affirm in part, reverse in part, and remand.

DISCUSSION

Closed hearing

Thomas requested that the district court close several of the pretrial hearings and the first day of the trial pursuant to NRS 125.080 and EDCR 5.02.[3] On appeal, Lisa argues that NRS 125.080 and EDCR 5.02 violate the First Amendment of the United States Constitution because the statute and rule grant one party the sole right to exclude the public from proceedings in domestic cases.

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[3] NRS 125.080 provides: In any action for divorce the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private and upon such direction all persons shall be excluded from the court or chambers wherein the action is tried, except the officers of the court, the parties, and their witnesses and counsel.

EDCR 5.02(a) provides: In any contested action for divorce . . . the court must, upon demand of either party, direct that the trial or hearing(s) on any issue(s) of fact joined therein be private and upon such direction, all persons shall be excluded from the court or chambers wherein the action is heard, except officers of the court, the parties, their witnesses while testifying, and counsel.

Lisa fails to specify any substantive injury she incurred due to the closure of the hearings. Accordingly, we will not reach this claim of error. Moreover, as Lisa herself demanded that the proceedings below conducted on December 9, 2002, be closed, she cannot now claim she was injured by the court's closure of the hearings in this case.[4]

Community debt

Lisa argues that the district court abused its discretion by basing its computation of the community debt upon Thomas's AFC. This court will uphold a district court's findings of fact if they are supported by substantial evidence.[5] We conclude that under the circumstances of this case, the district court did not abuse its discretion.

Thomas's attorney directly examined Thomas concerning the extent and details of the community obligations, including the amounts owed to each individual creditor. However, when counsel attempted to obtain formal admission of the creditors' statements, the district court stated it would calculate the community debt based upon Thomas's AFC. Shortly thereafter, Thomas's counsel indicated he was in possession of the creditors' statements, and had sent the statements to Lisa's attorneys a few days prior. While Ms. Barber indicated that she did not anticipate disputing the creditors' statements, she asked to borrow the district court's copy of the proposed exhibits because she left her copy at the office. The district court then asked Ms.

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[4] Lisa argues that she was manipulated into moving to close proceedings to compromise her opposition to the use of NRS 125.080. While she may have found it necessary to resort to NRS 125.080 to exclude a potential witness, we cannot conclude that nay of the rulings related to the closure of proceedings or the exclusion of witnesses mandate reversal.

[5] Gepford v. Gepford, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000).

Barber to review the statements while Mr. Gowen continued to listen to Thomas's direct examination. For the duration of the hearing on that specific day, Lisa's attorneys did not object to the admission of the exhibits. While there was some dispute over the extent to which Lisa's attorney had stipulated to the statements, Lisa's counsel did not object to the admission of supporting documentation during Thomas's direct examination, did not object to the calculation at the time the district court adopted it, and has not produced in the record documents supporting her claims that the district court overstated the debt. It therefore appears from the record that Thomas attempted to testify to the accuracy of the AFC and that Lisa's attorneys were able to cross-examine Thomas about its contents. Accordingly, it appears that the district court relied upon the AFC because documentation supported it.[6]

Payments

Lisa argues that the district court erred in finding that Thomas provided Lisa "approximately" $30,000 to pay community debts. We note that the district court order indicates that Thomas provided Lisa $30,000 for community debt and support of the family from June 2000 until March 2001. Lisa acknowledges that Thomas provided her approximately $22,654 for payment of community debt and Lisa's own exhibits indicate that she received approximately $7,200 in child support. We therefore discern no error in the court's determination that Thomas paid Lisa approximately

[6] The district court again recalculated the community debt during Thomas' closing statements. The $52,000 calculated debt included, in part, the following owed amounts: $7800 to City Bank, $9700 to First U.S.A., $4800 to MBNA, $11,2000 to U.S.A.A., $500 to Capital One, $3500 to Clark County Credit Union Visa, $2000 to Clark County Credit Union, $2000 to Boulder Dam Credit Union for a signature loan, $6000 to the I.R.S. and $3400 to Silhouette for a makeup loan.

$30,000 for payment of community debt and support of the family.

We note, however, that Lisa's exhibits indicate that she received the majority of the ordered child support between June 2001 and February 2002. Thus, it appears that Lisa did not receive the entire $30,000 until after March 2001. Therefore, it appears that the district court incorrectly stated the time frame during which Lisa received these sums. We conclude, however, that this error does not merit reversal.

Waste

Lisa argues that the district court abused its discretion by not finding that Thomas committed waste by paying child support or paying for necessities for the twins he fathered with his fiancée during the pendency of the divorce proceedings. Pursuant to NRS 125B.020, the parents of a child have a duty to provide the child necessary maintenance and support, and the father is also liable to pay the expenses of the mother's pregnancy and confinement.[7] The trial transcript indicates that Thomas paid a portion of the expenses his fiancée incurred during her pregnancy. The trial transcript also indicates that Thomas has a child support obligation of $950 per month for the twins, but he currently pays for the twins' necessities directly, rather than making child support payments, as his fiancée and the twins are currently living with him. Given Thomas's legal obligation set forth in NRS 125B.020, we conclude that the support Thomas provided to his fiancée while she was on bed rest and the support he provided for the twins after they were born does not constitute waste.

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[7] NRS 125B.020(1) and (3).

However, Lisa had a community property interest in Thomas's earnings until the entry of the divorce decree and the issue remains whether Thomas improperly used Lisa's share of the community property to provide support for his new family. Therefore, on remand, we direct the district court to determine Thomas's gross earnings from the time of separation until entry of the divorce decree, less federal income tax withholding, less his PERS contribution. Should Thomas's payments to Lisa be greater than one half of his net income, then Lisa is not an aggrieved party. If Thomas's payments to Lisa during this period is less than one half of his net income, then the district court must award the difference to Lisa.

- Employment

Both parties contend that the other party was either willfully underemployed or unemployed throughout the proceedings below. In support of her position that Thomas was willfully underemployed, Lisa notes that upon his return to Nevada, Thomas accepted a position with the Nevada Attorney General's Office with a starting salary of approximately $67,000, whereas Thomas previously earned approximately $93,000 with the Federal Public Defender's Office in Tennessee. Thomas testified at trial that his supervisor at the Federal Public Defender's Office discovered that Thomas had overstated his expenses for an out-of-state trial, and gave Thomas the option to resign or be terminated. Thomas testified that upon his resignation, he sought various positions in the public and private sector, but all the available positions paid salaries ranging from $50,000 to $75,000 a year. Thomas also testified that he ultimately accepted a position with the Attorney General's Office with a starting salary of $67,000, because the position allowed him to regain access to the PERS system in which he had already accumulated six years of credit. Given the starting

salaries of the positions available to Thomas, we conclude that Thomas was not purposefully underemployed. In this, we note, that the circumstances under which he left his employment with the Federal Public Defender's Office may have significantly reduced Thomas's chances of obtaining a higher paying position.

Thomas contends that Lisa remained willfully unemployed throughout the divorce proceedings. During the proceedings below, Lisa maintained that various medical conditions limited the types of employment she could obtain. However, Lisa's attorney failed to enter into evidence a copy of Lisa's physical exam verifying these health conditions. As Lisa failed to present such evidence, we conclude that the district court did not abuse its discretion in refusing to grant Lisa interim support. We also conclude that the district court's award of alimony adequately addressed Lisa's other financial constraints including the lack of appropriate business attire and transportation.

Divorce decree

Lisa argues that the divorce decree fails to dissolve the parties' marriage. While the decree does not specifically provide that the bonds of marriage were dissolved, it does state that Thomas is "entitled to a decree of divorce" from Lisa. Additionally, the decree is entitled "FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF DIVORCE." We conclude that to the extent that the decree omits the standard language adjudicating the actual divorce, the omission is a clerical rather than judicial error and subject to nunc pro tunc correction.[8]

[8] See Smith v. Epperson, 72 Nev. 66, 69-70, 294 P.2d 362, 363-64 (1956).

Discovery

Lisa next argues that the district court abused its discretion by failing to compel Thomas to produce financial records requested by Lisa or, in the alternative, to hold such evidence as adverse to Thomas and preclude Thomas from testifying on any issues related to those documents. At trial, Thomas acknowledged that, during the pendency of the divorce, he would pay the couple's monthly bills and then throw away the creditors' statements. Thomas also testified that he did not produce documents for accounts he held jointly with Lisa because he assumed that she could acquire the documents herself. The district court concluded that Thomas failed to comply with Lisa's discovery requests, but that she was not ultimately harmed by this failure because she was able to acquire the statements by subpoena. We conclude that the district court committed no abuse of discretion in this regard.[9] While Thomas failed to comply with Lisa's discovery request, the district court adequately compensated Lisa for the attorney fees and costs she incurred in acquiring the documents by subpoena.

Bias

Lisa next argues that she was denied her right to a fair and impartial trial because of the district court's bias against her. Lisa cites several examples of the district court's animus, including one instance in which the district court stated, "(Lisa is) a very smart woman. I don't have anything in the record that shows...she couldn't be working at a 7-Eleven, for example . . ." Lisa takes issue with the district court's suggestion that she take a position as a clerk at a convenience store.

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[9] Diversified Capital v. City N. Las Vegas, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979).

We admonish the district court from making such statements in the future. However, while this statement was inappropriate, our review of the record reveals no discernable bias warranting reversal.

> (F)ew trials are totally devoid of inadvertent remarks or actions by a trial judge which may seem inappropriate...The question is whether the trial umpire's misadventures are so pervasive and of such a magnitude that the trial ambiance is discernibly unfair to...(a party)...when viewed from the cold record on appeal.[10]

We conclude that this remark, albeit ill-advised, does not mandate reversal.

We have reviewed Lisa's other contentions, and conclude they lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

/s/ Maupin
/s/ Gibbons
/s/ Hardesty

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[10] McNair v. State, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992).

DECD
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APPENDIX C

DISTRICT COURT

CLARK COUNTY, NEVADA

THOMAS J. GIBSON,	)	
	)	
Plaintiff,	)	Case No. D268612
	)	Dept. No. A
vs.	)	
	)	
LISA J. GIBSON,	)	Date of Hearing: 01/15/2003
	)	Date of Hearing: 9:00 a.m.
Defendant.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF DIVORCE

This matter, having been tried on January 15, 2003, Plaintiff appearing in person and through his counsel, Christopher R. Tilman, Esq., and Defendant appearing in person and through her counsel, Gary Gowen, Esq., the Court, having heard the evidence of witnesses sworn and examined in open court, and the cause having been submitted for decision and comment, and the Court being fully advised as to the law in the facts of this case, and issued a Minute Order February 12, 2003.

AS A RESULT OF ALL OF THE EVIDENCE PRSENTED (DOCUMENTARY OR TESTIMONIAL OTHERWISE), THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

1. That the Court has jurisdiction in the premises, both as to the subject matter thereof as well as the parties herein;

2. That the Plaintiff now is, and has been, an actual and bona fide resident of the County of Clark, State of Nevada and has been actually domiciled therein for more than six (6) weeks immediately preceding the commencement of this action;

3 That the Plaintiff is entitled to a decree of divorce from the Defendant on the grounds as set forth in Plaintiff's Complaint;

4 That the Defendant has filed an Answer and has not waived findings of fact, conclusions of law or written notice of entry of judgment in said cause, and,

5 That the parties were married in December, 1989.

6 That there are two (2) minor children the issue of this marriage; REBECCA GIBSON, born November 20, 1990; and KATHLEEN GIBSON, born October 1, 1992.

7 That this matter was heard April 4, 2002, and an Interim Order was filed March 20, 2002 regarding UCCJA Jurisdiction and other temporary orders.

a. That New Hampshire assumed UCCJA Jurisdiction over the two minor children, as well as all matters of custody and child support as Defendant had filed a subsequent action in New Hampshire.

8 At the time of the marriage, the Plaintiff had not yet been admitted to practice law in the State of Nevada, but was subsequently admitted in 1990.

9 That Defendant was licensed to practice law in the State of Nevada, and was employed at the time of the

marriage, with an approximate income of $40,000 per year. From November, 1990, the Plaintiff was employed with the Clark County Public Defender's Office in Las Vegas, Nevada. In November, 1996, the Plaintiff sought alternative employment and was offered a position with the Federal Public Defender's Office in Tennessee. Plaintiff accepted the offer of employment, with an approximate income of $90,000 per year, and the parties subsequently moved to Tennessee.

10 That Plaintiff maintained employment with the Federal Public Defender's Office in Tennessee until May of 2000, when he was given the choice of either resigning or being fired. Shortly thereafter, Plaintiff, while in Las Vegas, received an offer of employment from the Attorney General's Office in Las Vegas. Plaintiff accepted the offer, and relocated to Las Vegas in June, 2000, while Defendant stayed in Tennessee.

11 From June, 2000 to March, 2001, the Plaintiff provided approximately $30,000 to the Defendant for the support of the family and for payments on community debts.

12 That the marital residence in Tennessee was ultimately foreclosed upon and the Court had previously issued findings regarding this matter, which shall be incorporated herein by the Plaintiff's counsel.

13 That in March, 2001, the Defendant moved from the residence to New Hampshire to reside with extended family members.

14 The Plaintiff is currently employed with the Nye County District Attorney's Office, with a gross monthly income of approximately $6,000. Plaintiff currently has a

child support obligation to Defendant in the amount of $1,344.00 per month through the New Hampshire Court.

15 That there is community debt in the amount of approximately $52,000.00, which Plaintiff has been maintaining during the pendency of this action.

16 That Plaintiff has fathered twin children with his significant other, and has a child support obligation on those two children.

17 At the time of trial, Plaintiff testified that the children and mother are residing with him and are being supported directly by Plaintiff and his significant other, who is employed by the Nye County School District.

18 That the Defendant is 43 years old, she received her BA in 1980 and her law degree in 1983.

19 That Defendant was employed as a Special Agent with the FBI, From 1983 through 1987.

20 The Defendant left the FBI to pursue a career in law and moved to Las Vegas.

21 Defendant was admitted to the Nevada State Bar in 1988 and was employed by several firms for short periods of times.

22 The Defendant became pregnant with the parties' first child in the Spring of 1990.

23 The Defendant gave birth to the parties' second child in October, 1992.

24 The Defendant has not maintained gainful employment since 1990.

25 That although there was conflicting testimony regarding the parties' understanding as to Defendant's employment, it is clear that the parties agreed that Defendant, at the very least would be a stay at home mother until the youngest child started first grade.

26 That both parties acknowledged that by February, 2001, the parties differences had become irreconcilable and the marriage would end in divorce.

27 That since February, 2001, the Defendant has not sought employment and has little, if anything, to prepare herself to the re-entry into the job market.

28 That despite the Defendant's prior allegation set forth in various pleadings, she does not suffer from any disability or medical condition which would prevent her from seeking employment.

29 That the Defendant could present no evidence which could justify her failure to seek employment during the pendency of this action.

30 That there were substantial debts of the parties, and the Plaintiff has done his best to maintain these debts during the marriage.

31 That the Defendant will be entitled to an award of alimony.

32 That if any of these Findings of Fact is more properly deemed a Conclusion of Law, so be it.

THE COURT HEREBY MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That the New Hampshire Court retained UCCJA Jurisdiction over the minor children in this matter, as well as all child support and custody issues.

2. That as for the issue of alimony, the Court will look at NRS 125.150 as well as the factors of Buchanan. NRS 125.150(1) states in pertinent part:

> 1. In granting a divorce, the court:
>
> (a) May award alimony to the wife or the husband, in a specified principal sum or as specified periodic payments, as appears to be just and equitable.

1. If alimony is warranted, the Court must consider the respective merits of the parties and the "conditions in which the parties will be left by the divorce". Shydler v. Shydler, 114 Nev. 192, 194, 954 P.2d. 37, 38 (1998); Heim v. Heim, 104 Nev. 605, 608, 763 P.2d 678, 680 (1988). "Alimony is an equitable award serving to meet the post-divorce needs and rights of the former spouse. It follows from our decisions in this area that two of the primary purposes of alimony, at least in marriages of significant length, are to narrow any large gaps between the post-earning capacities of the parties, and to allow the recipient spouse to live "as nearly as fairly possible to the station in life enjoyed before the divorce." The individual circumstances of each case will determine the appropriate amount and length of any alimony award." Id. 114 Nev. At 198 (citation omitted).

In the Heim case, the Nevada Supreme Court utilized income equalization analysis to determine whether the trial court's alimony was just and equitable.

In Buchanan v. Buchanan, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974) the Nevada Supreme Court enumerated several factors the trial court must consider, among other matters:

1. the financial conditions of the parties
2. the nature and value of their respective property
3. the contribution of each to any property held by then as tenants by the entirety
4. the duration of the marriage
5. the husband's income
6. his earning capacity
7. his age, health and ability to labor
8. the wife's age, health, station and ability to earn a living

The Buchanan factors were mentioned and applied again in Rodgriguez v. Rodrigues, 116 Nev. Adv. Op. No. 107, 13 P.3d 415 (2000).

3. The Court can infer that, under NRS 125.150 and the factors in Buchanan v. Buchanan, Defendant would be entitled to alimony.

4. If any of these Conclusions of Law is more properly deemed a Finding of Fact, so shall it be deemed.

AS A RESULT OF THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE COURT

HEREBY ORDERS, ADJUDGES AND DECREES THE FOLLOWING:

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGES AND DECREED that the parties have no substantial community property, and Defendant is capable of being employed and earning an income to support herself but, has chosen not to do so.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is approximately $52,000.00 in community debt. The Court has considered all of the factors set forth in Springer, and Buchanan, Plaintiff's ability to pay, and Defendant's need for spousal support and finds an equitable award of spousal support to be warranted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff failed to comply with discovery regarding disclosure of his personnel records with the Federal Public Defender's Office. Plaintiff failed to maintain documents during the pendency of this matter, such as bank statements and credit card statements, which he could have known were discoverable and relevant. As a result of Plaintiff's failure to maintain such records, the Defendant was forced to incur unnecessary fees and costs to obtain such information directly from the banking and lending institutions. Accordingly, the Defendant is entitled to an award of attorney's fees for Plaintiff's failure to comply with discovery.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant is entitled to an award of attorney's fees in defense of this action pursuant to Sargeant. However, such an award must be reasonable based upon the complexity of the issued to be tried, the extent and nature of the discovery, and the extent and nature of any necessary

pretrial Motions. After considering these three factors, the Court finds that an award of attorney's fees in the amount of $10,000 be reasonable and appropriate. In addition, the Defendant is entitled to an award of costs incurred in procuring the financial records in the amount of $1,417.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the community debt of approximately $52,000.00 should be divided evenly between the parties. Plaintiff shall assume responsibility for said debts, and hold the Defendant harmless therefrom. Plaintiff is entitled to a judgment against Defendant for her share of the community debt in the amount of $26,000.00, to be off-set by the award of attorney's fees and costs has herein set forth above, leaving a balance of $14,583.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that given the Court's Findings as set forth herein, the Court further finds that a lump sum award of both rehabilitative and equitable spousal support to be warranted in the amount of $14,583.00, which shall be off-set against the remaining balance of the equalization of community debt.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties stipulated in Court that Plaintiff's PERS retirement, as well as FERS retirement, shall be split equally during the length of the marriage, according to Gemma.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant failed to establish a legal basis for her claim for an unequal division of community property. In addition, Defendant failed to sufficiently establish that Plaintiff committed community waste to warrant a finding of an unequal distribution of community property and debt to be warranted.

Dated this 29th day of May, 2003.

/s/ William O. Voy
DISTRICT JUDGE

Submitted by:

/s/ Christopher R. Tilman
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